

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FC 2011-002723

07/18/2012

JUDGE DAVID J. PALMER

CLERK OF THE COURT

C. Soto

Deputy

IN RE THE MARRIAGE
AMY JO DAURIO

J VINCENT GONZALEZ

AND

STEVEN L DAURIO

PHILIP A SEFLOW

FAMILY COURT SERVICES-CCC

UNDER ADVISEMENT RULING

The Court took this matter under advisement following trial and now rules as follows having considered the evidence, testimony and credibility of the witnesses presented:

The court convened an evidentiary hearing on May 14, 2012 on the Notice to the Court of Theft of Property and Request for Relief filed by Respondent, and Petitioner's Response and Amended Response to that pleading and Respondent's amended Reply.

The parties were divorced pursuant to a decree in this matter previously issued by this court on February 10, 2012, after an evidentiary hearing held on December 14, 2011. Prior to the beginning of the December 14 hearing, the parties placed onto the record an agreement which appeared to have resolved all of the issues regarding the disposition of marital property.

One of the agreements was that Father, who would be awarded possession of the marital residence, would conduct a "walk through" inspection of the residence the very next day, December 15, 2011, accompanied by Mother's paralegal Calah Thomas, who also testified at trial. That "walk through" did occur the next day as agreed upon, and each party submitted DVD's of the "walk through," which were introduced as exhibits in court and each reviewed very carefully by the court.

The "walk through" was to verify the presence of certain items of personal property in the residence, as the parties had agreed to a disposition of the personal property left in the

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residence after Mother would be vacating the residence, with Father to keep the items not specifically allocated to Mother.

The parties had also participated in a settlement conference regarding the disposition of property prior to the hearing wherein they appeared to agree to the disposition of property, against which the division of a 401(k) account belonging to Father was offset, as Mother was allowed to remove \$35,000 via a qualified domestic relations order. Father was to pay the penalties and taxes associated with the division of that account.

Immediately after the walk through, Father immediately filed his Notice of Theft referred to herein, alleging that Mother had removed numerous items of personal property belonging to the parties. One of the items was a coin collection, although many other items were alleged to be missing as well were mentioned. Photographic evidence was introduced to establish that the items were in the residence before the parties separated, and missing during the walk through after the period that Mother had sole control of and access to the home.

In her response and in her testimony, Mother claimed that (1) she did not remove the items and did not know who did; (2) that Father did not establish that certain items were removed; (3) that the items she did remove were items she “gifted herself” during the marriage; and (4) that the items listed were valued at less than \$500 and therefore not the subject of the court’s orders dividing the property.

Finding the latter theory to be most curious, the court ordered at the conclusion of the hearing that the parties were to submit brief memoranda regarding where such a notion could come from, as this court is not aware of any such legal support for such a conclusion. Upon review of the memoranda submitted by the parties, the court still finds no support for such a conclusion.

The court had indicated in a minute entry that in preparing a joint pretrial statement, any disputed items of property should be listed in preparation for trial, except for items worth less than \$500.00. That was simply to prevent the preparation of an overly voluminous pretrial statement and in no way could have been reasonably construed to grant one party open season to take any such items to keep without consulting with the other or without permission of the court.

As to the notion of a party “gifting” certain items to oneself during the marriage with community funds or through the use of a community credit card, there is no legal support for such a proposition. While there are certain items that a party acquires that may be uniquely or distinctly his or hers and agreed by the parties or ordered by the court to go to one party or the other, there is certainly nothing that makes such an item exempt in and of itself from the normal provisions of community property law, and distribution under such law.

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Based upon the evidence presented at trial, including the testimony and exhibits submitted, the court makes the following findings and orders:

THE COURT FINDS that Mother, in contravention to the intent of the parties did either remove or take for her own purposes, or allow to be removed with no adequate explanation, numerous items of marital property that were reasonably expected to go to Father when he assumed possession of the marital residence. Given the reasonable expectations of the parties relative to the distribution of personal marital property and the \$35,000 equalization payment provided to Mother out of a 401(k) account in Father's name,

THE COURT FURTHER FINDS that as a matter of equity, an offset against those funds that were to go to Mother is appropriate. Admittedly, attaching exact values to items and determining exactly what items were taken cannot be done exactly. However, given all the testimony presented, the court does conclude that the majority of items listed as missing by Father in his Exhibit "A" to his Notice Regarding Theft.

THE COURT FURTHER FINDS some of the values attached to the items by Father are for the most part accurate. In an abundance of caution the court does find the value to be awarded as an offset to Father should be reduced to some degree.

IT IS THEREFORE ORDERED that the \$35,000.00 that was awarded to Mother from the 401(k) in Father's name is reduced to \$25,000.

ATTORNEY FEES AND COSTS

Section 25-324 provides as follows:

A. The court from time to time, after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings, may order a party to pay a reasonable amount to the other party for the costs and expenses of maintaining or defending any proceeding under this chapter or chapter 4, article 1 of this title. On request of a party or another court of competent jurisdiction, the court shall make specific findings concerning the portions of any award of fees and expenses that are based on consideration of financial resources and that are based on consideration of reasonableness of positions. The court may make these findings before, during or after the issuance of a fee award.

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B. For the purpose of this section, costs and expenses may include attorney fees, deposition costs and other reasonable expenses as the court finds necessary to the full and proper presentation of the action, including any appeal.

C. The court may order all amounts paid directly to the attorney, who may enforce the order in the attorney's name with the same force and effect, and in the same manner, as if the order had been made on behalf of any party to the action.

Upon consideration of the foregoing,

THE COURT FURTHER FINDS that Mother acted unreasonably in the litigation as it relates to the disposition of the marital property. Specifically, she acted unreasonably by doing the following: assuming, unreasonably assuming that many items of marital property she deemed to be worth less than \$500 were hers to take as she pleased as well as unreasonably disposing of many items as she saw fit, both without consulting Father.

Accordingly,

IT IS ORDERED granting to Father an award of attorney fees and costs relative to the Notice of Theft of Items and the hearing that resulted from that filing.

IT IS FURTHER ORDERED that Mother shall pay a portion of Father's reasonable attorney fees and costs relative to that issue. Not later than August 1, 2012, counsel for Father shall submit all necessary and appropriate documentation to support an application for an award of attorney fees and costs, including a *China Doll* Affidavit and a form of order. Thereafter, by no later than August 15, 2012, Mother shall file any written objection thereto. If Father's counsel fails to submit the application by August 1, 2012, no fees or costs will be awarded. The Court shall determine the award and enter judgment upon review of the Affidavit as well as any objections.

IT IS FURTHER ORDERED signing this minute entry as a formal written order of this Court pursuant to Rule 81, Arizona Rules of Family Law Procedure.

/S/: HONORABLE DAVID J. PALMER

JUDICIAL OFFICER OF THE SUPERIOR COURT

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FILED: Exhibit Worksheet

All parties representing themselves must keep the Court updated with address changes. A form may be downloaded at: <http://www.superiorcourt.maricopa.gov/SuperiorCourt/Self-ServiceCenter>.